Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
AT&T Corp. Petition Pursuant to 47 U.S.C. Section 160(c) of the Communications Act for Forbearance from Enforcement of Section 204(a)(3) of the Communications Act, As Amended	)	WC Docket No. 03-256

COMMENTS OF BELLSOUTH

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), submits its Comments in response to the *Public Notice* in the above referenced proceeding released by the Commission on December 24, 2003.[1]

I. FORBEARANCE MUST DECREASE, NOT INCREASE, REGULATION.

The fact that AT&T "deems awful" what Congress has "deemed lawful" is no legal basis for its "forbearance" petition. Quick to accept those provisions of the 1996 Act that facilitate its business goals, AT&T continues to deny any intent of Congress to reform regulation of local exchange carriers ("LECs"). Reacting to a significant Congressional legal determination with important, though limited, deregulatory consequences, as faithfully implemented by this Commission and upheld by the D.C. Circuit, AT&T asks this Commission to substitute its judgment for that of Congress by perverting its statutory forbearance authority in order to re-impose regulatory handicaps on AT&T's market rivals.

---

[1] *Pleading Cycle Established for AT&T's Petition for Forbearance from Enforcement of "Deemed Lawful" Provision of Section 204(a)(3) of the Act*, WC Docket No. 03-256, *Public Notice*, DA 03-4076 (rel. Dec. 24, 2003).

AT&T does not seek forbearance from regulation for itself;[2] rather, it asks this Commission to disregard a specific legal determination made by Congress in the context of a deregulatory provision added to the 1934 Act by the 1996 Act with respect to a separate class of carriers. It does so in order that its interexchange operations may return to the *status quo ante* the 1996 Act. Upon a proper petition, this Commission may *forbear* from enforcing certain provisions under certain circumstances of the Act in order to reduce regulation on a petitioning telecommunications carrier or class of carriers, but as a legal and practical matter it may not pick and choose words within the Act's deregulatory provisions for administrative *repeal* in order to *increase* regulation on a forbearance petitioner's rivals.[3]

The purpose of the Act has been oft stated, "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[4] The goal of the deregulatory framework of the 1996 Act was not to pick and choose the winners among competing firms, or classes of firms, but rather to establish the conditions that would allow the marketplace to decide the actual winners and losers. Congress sought to establish these deregulatory conditions in two ways. First, by enacting new, specifically deregulatory provisions that reflected Congress's judgment as to the appropriate regulatory paradigm in light of the regulatory experience to date;

---

2 This contradicts Congress's specific direction that petitions for forbearance request that forbearance authority be exercised "with respect to that [petitioning] carrier or those carriers, or any service offered by that carrier or carriers." 47 U.S.C. § 160(c).

3 Simply put, the forbearance provision of the statute enables the Commission to refrain from exercising authority that it is granted under the act. It does not permit the Commission to excise words from the act to create new authority, that, absent forbearance, the Commission does not have.

4 S. Rep. No. 104-230, at 1 (1995).

and second, to provide the Commission with specific, statutory forbearance authority to be exercised when existing statutory provisions or their implementing regulations become at best, unnecessary, and, at worse, an impediment to free and fair competition for those carriers to which they applied.

Indeed, Section 103 of H.R. 1555, the forerunner of section 10 of the 1996 Act, was created by the U.S. House of Representatives to "require" the Commission to forbear from "Title II common carrier regulation."[5] The House Committee in its report expressly stated that it "anticipates this forbearance authority will be a useful tool in *ending* unnecessary regulation."[6] AT&T, however, invokes the Commission's forbearance authority to *restore* regulation that Congress has determined to be unnecessary, or as it states, disingenuously, to "*reinstate legal incentives for LECs*."[7] Thus, even if the Commission could, as a matter of law, grant the relief sought in AT&T's petition, it would increase the amount of regulation over local exchange carriers in derogation of Congressional intent expressed in the 1996 Act. The Commission would also make a mockery of the principle of finality, as an unsuccessful appellant of a final agency deregulatory action could, as AT&T transparently attempts to do here, seek to "reverse" an Article III appellate court through the inappropriate invocation of the Commission's statutory forbearance authority.

---

5 H.R. Rep. No. 104-204, pt. 1, at 89 (1995).

6 *Id.* (emphasis added).

7 AT&T Petition at 19 (emphasis added).

II. THE COMMISSION CANNOT CONSTRUE TARIFFS THAT CONGRESS HAS DEEMED LAWFUL BY OPERATION OF STATUTE AS UNLAWFUL IN ANY MANNER INCONSISTENT WITH THAT STATUTE.

Congress, after careful deliberation by both houses, made a specific determination of tariff lawfulness that expresses its sense of the public interest and was intended to free this Commission from certain regulatory oversight over LECs as a consequence. Specifically, Congress, in Section 204(a) of the 1996 Act, singled out LECs as a class of carriers and established for them an immediate and nondiscretionary streamlined regulatory process that became effective immediately. Located in the heart of this fundamentally deregulatory provision is Congress's "deemed lawful" determination. This is a deliberate and calculated statutory shift in the long-standing and well-settled law from when tariff rates were considered "legal" rates that could nonetheless be subsequently determined to have been unlawful upon a subsequent adjudication by an agency.

The shift brings with it profound and intentional deregulatory consequences, although AT&T exaggerates and fails to support the rhetoric upbraiding these consequences. A LEC tariff that Congress has "deemed lawful" (as that term has been interpreted by this Commission, as that interpretation has been upheld by the D.C. Circuit, the legal meaning of which is not challenged and therefore is conceded by AT&T in its petition) upon its effective date cannot, as a matter of law, be "unlawful" for any period during which the rate deemed lawful by statute was in effect. [8] Where, as here, the natural and inevitable regulatory consequence of this Congressional determination of lawfulness has been a reduction in regulation applicable to LECs, and where the expressed intent of petitioner's forbearance request is *not* to obtain a reduction in regulation

[8] LEC streamlined tariffs are not deemed lawful before they take effect, and are subject to findings of unlawfulness and Commission rate prescription after they take effect.

applicable to it but rather the restoration of common carrier regulation over competitive rivals that was expressly eliminated by Congress, petitioner at best misapprehends and at worst perverts the purposes for which Congress gave the Commission statutory forbearance authority.

It cannot be over-emphasized that the primary purpose of Congress in enacting the Telecommunications Act of 1996 was to establish a pro-competitive, deregulatory framework for the original 1934 Communications Act. The very essence of this deregulatory framework is the absence of a regulatory agency's intervention in the operations of telecommunications carriers. Section 204(a)(3) is Congress's expression that, for LECs, the framework it has established through the Telecommunications Act obviates the need for regulatory intervention and scrutiny after lawfulness attaches to certain tariff filings. Congress's conferral by statute of tariff lawfulness necessarily replaces agency implementing regulation and adjudication with the operation of the marketplace as the preferred means of oversight for charges, practices and classifications in streamlined LEC tariffs after their effective dates. Section 204(a)(3) is an example of precisely the kind of deregulatory approach that the exercise of forbearance is meant to complement, not eliminate, and therefore is an inappropriate object of AT&T's latest regulatory gamesmanship.

AT&T's petition seeks not to eliminate regulation for itself, but rather to eliminate a part of a statutory provision it finds exceptionally disagreeable. It does so with the expressed aim that the Commission "will simply *restore* to access customers the remedies for unlawful access rates they enjoyed *prior* to enactment of Section 204(a)(3), and thereby *reinstate* legal incentives for LECs to adopt just and reasonable tariffs."[9] This completely misstates the Commission's authority under the Communications Act in the first instance. The Commission's authority is

[9] AT&T Petition at 19 (emphasis added).

derivative - Congress delegates its authority to the Commission. Nothing requires Congress to delegate this authority in whole or in part, or to reserve unto itself certain legal determinations.

The Commission, acting on delegated authority, may implement Congress's goals as expressed in the act. Although the grant of statutory forbearance authority extends to any regulation or "any provision of this chapter," because the regulation or provision applies to a specific carrier or class of carriers, forbearance cannot be used indiscriminately and without regard to the deregulatory context of the 1996 Act and its specific deregulatory provisions. Section 204(a)(3) is, as shown above, a facially deregulatory provision that is wholly inappropriate for forbearance. Within that deregulatory provision is contained Congress's specific legal determination that effective pre-suspension LEC tariffs are, as a matter of statute, "lawful." The determination of tariff lawfulness itself is a legislative act;[10] thus, when the Commission prescribes a lawful rate after a tariff investigation (whether for non-streamlined tariffs or for new rate prescriptions for streamlined tariffs in the context of Section 208 proceedings) it is acting in a legislative capacity, upon authority delegated to it by Congress. Under Section 204(a)(3), LEC streamlined tariffs are already "deemed lawful" by direct Congressional action, rather than through delegation to Commission adjudication.

Therefore, the "deemed lawful" portion of Section 204(a)(3) is a dispositive Congressional determination that reforms the regulatory process for LECs in a way that moves away from regulation toward competition. It is essential congressionally mandated deregulation that the Commission has no ability to disturb under any rational interpretation of its forbearance authority. The Commission cannot use its statutory forbearance authority to give itself new, additional, or even "revived" regulatory authority over a petitioner's rivals that has been

10 *See Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 388 (1932).

expressly delimited by Congress without completely subverting the deregulatory intent of the 1996 Act and undermining Congress's goal of allowing the market, and not the government, to decide the success of competing carriers.

III. AT&T'S COLLATERAL ATTACK ON LEC INCENTIVE REGULATION, ACCESS CHARGES, AND THE STREAMLINED TARIFF ORDER FAILS TO MEET THE STATUTORY REQUIREMENTS FOR FORBEARANCE.

AT&T's Petition is a wolf in sheep's clothing. Part of AT&T's aggressively litigious and multi-faceted attack on LEC access charges, stripped to its essentials it is nothing more than an untimely petition for reconsideration of both the agency's *Streamlined Tariff Order*[11] and the *Streamlined Tariff Reconsideration Order*,[12] a renewal of its collateral attack on incentive-based regulation for ILECs (both price-cap and pricing flexibility),[13] and a reiteration of its "impairment" arguments around switched and special access raised in 1996, 1999 and 2002 in the *Local Competition* docket.[14]

AT&T itself admits that "[t] he only change from the *status quo* resulting from granting forbearance is that access customers could now seek reparations from the LECs for excessive, discriminatory or otherwise unlawful streamlined tariffs that have been permitted to take effect

---

11 *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, *Report and Order*, 12 FCC Rcd 2170 (1997) ("*Streamlined Tariff Order*").

12 *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, *Order on Reconsideration*, 17 FCC Rcd 17040 (2002) ("*Streamlined Tariff Reconsideration Order*").

13 AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM No. 10593, Petition of AT&T (filed Oct. 15, 2002); AT&T Corp., AT&T Wireless, The CompTel/ASCENT Alliance, eCommerce and Telecommunications Users Group, and the Information Technology Association of America, Petitioners, No. 03-1397, Petition for a Writ of Mandamus (D.C. Cir. filed Nov. 5, 2003).

14 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of AT&T (filed May 16, 1996, May 26, 1999 & April 5, 2002); Reply Comments of AT&T (filed May 30, 1996, June 10, 1999 & July 17, 2002).

without suspension."[15] This is precisely the result AT&T lobbied unsuccessfully to obtain in both *Streamlined Tariff* proceedings and is absolute nonsense as a matter of law. That which Congress itself has declared as a matter of law to be lawful (pre-suspension LEC streamlined tariff rates) cannot, *a multo fortiori*, be unlawful.

Moreover, AT&T presents no facts that show why Congress's determination that certain streamlined tariffs should be deemed lawful should change. Congress made this determination even before the Commission implemented the market opening provisions of section 251, and concurrent with its decision to eliminate all local and state laws that had the effect of preventing local competition. Of course, in the decade before the Act competitive access providers had been deploying fiber networks that competed with LEC provision of dedicated transport service, and in 1992 the Commission promulgated its expanded interconnection rules for the express purpose of augmenting competition in the high capacity transport market. Thus, there was ample reason for Congress to make the specific deregulatory determination in Section 204(a) of the Act that AT&T continues to challenge.

Indeed, Section 204(a) of the Act no doubt reflects Congress's considered judgment that, in the wake of the demonstrated success of alternative transport providers and increasing mergers and consolidations of IXCs and CAPs, the existing regulatory approach lagged behind the changing market environment, leaving LECs at a significant competitive disadvantage vis a vis their competitors. The subsequent record in the *Local Competition* proceeding, the findings of the *Pricing Flexibility Order*, the Commission's subsequent carrier-specific grants of pricing flexibility, and the Commission's findings with regard to inter-carrier transport links in the *Triennial Review Proceeding*, all demonstrate that competition in all relevant markets has

---

15 AT&T Petition at 4-5.

increased, not decreased, as a result of the market-opening initiatives that were legislated by Congress and those that were implemented by the Commission and sustained by the courts.

The "facts" that AT&T presents in its petition are merely a statement of the state of affairs as it exists today – the intended legal consequences of the deliberate determinations of Congress, the Commission, and the D.C. Circuit Court of Appeals. That AT&T, other carriers or the Commission have failed to unleash a flurry of enforcement actions against LEC tariffs in the wake of the *Streamlined Tariff Order* is hardly "proof" of the need for forbearance. The absence of formal complaints, informal complaints or other enforcement activity is hardly proof that existing enforcement mechanisms are not working. The Commission should reject AT&T's attempts to use a negative to prove a positive.

Finally, even if the Commission were to consider the petition in light of the test outlined in the statute, it would have to deny the relief sought. Congress has already made the determination that it is not necessary for the Commission to adjudicate the lawfulness of certain streamlined tariffs, and the purpose of forbearance is to reduce regulation, not to allow the Commission to reconsider Congress's own deregulatory legislation. Therefore, the first prong of the test is irrelevant. Second, the fact that a 204(a)(3) lawful rate may be the subject of a Section 208 complaint alleging that it has become unjust and unreasonable and may be subject to Commission prescription fully protects consumers while maintaining the limited freedom from unduly burdensome and complicated regulatory oversight that Congress envisioned. Finally, because the effect of forbearance in this case is the practical "repeal" of a deregulatory provision of the 1996 Act in derogation of the express intent of Congress, and would reinstate additional legal requirements on LECs that were obviated by Congress's determination of streamlined tariff "lawfulness," forbearance would not be in the public interest. The Commission simply cannot

find the public interest to be something other than that which the Congress of the United States has declared it to be in the deregulatory provisions of the 1996 Act.

IV. CONCLUSION

For the foregoing reasons, AT&T's forbearance petition should be denied.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Richard M. Sbaratta
Theodore R. Kingsley
Richard M. Sbaratta

Its Attorneys

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: January 30, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 30th day of January 2004 served the following parties to this action with a copy of the foregoing **COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 20554

+Qualex International
The Portals, 445 12th Street, S. W.
Room CY-B402
Washington, D. C. 20554

Leonard J. Cali
Lawrence J. Lafaro
Peter H. Jacoby
AT&T
Room 3A251
One AT&T Way
Bedminster, NJ 07921

Tamara Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications
The Portals, 445 12th Street, S. W.
Room 5-A221
Washington, D. C. 20554

/s/ Juanita H. Lee
Juanita H. Lee

+ **VIA ELECTRONIC FILING**